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Supreme Court, U.S.
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No. 00-1500

IN THE

Supreme Court of the United States

JULIO MENDIOLA,

Petitioner,

v.

JAMES M. SCHOMIG, Warden,
Pontiac Correctional Center,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF

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15 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. THE SEVENTH CIRCUIT MAJORITY FAILED TO RECOGNIZE THAT STATE COURT DETERMINATIONS OF FACT THAT ARE THE PRODUCT OF INADEQUATE PROCEDURES ARE NOT ENTITLED TO A PRESUMPTION OF CORRECTNESS. 2

II. THE SEVENTH CIRCUIT IGNORED THE CRITICAL DISTINCTION BETWEEN A DEFENDANT'S ENTITLEMENT TO FEDERAL RELIEF AND HIS ENTITLEMENT TO A FEDERAL EVIDENTIARY HEARING. 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Barnett v. Hargett, 174 F.3d 1128 (10th Cir. 1999). 5

Hughes v. Johnson, 191 F.3d 607 (5th Cir. 1999). 4

Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). 9

Mayes v. Gibson, 210 F.3d 1284 (10th Cir. 2000) 5

Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998). 4

Morris v. Cain, 186 F.3d 581 (5th Cir. 1999). 5

Murphy v. *Johnson*, 205 F.3d 809 (5th Cir. 2000). 7

Perillo v. Johnson, 79 F.3d 441 (5th Cir. 1996). 7

Sumner v. Mata, 449 U.S. 539 (1981). 2, 3

Thomas v. Taylor, 170 F.3d 466 (4th Cir. 1999). 4

Torres v. Prunty, 223 F.3d 1103 (9th Cir. 2000). 5, 10

Townsend v. Sain, 372 U.S. 293 (1963). 9

United States v. MMR Corp., 854 F.2d 1040
(5th Cir. 1992). 8

United States v. Provost, 969 F.2d 617 (8th Cir. 1992). . 7, 8

Vargas v. Lambert, 159 F.3d 1161 (9th Cir. 1998). 3

Weaver v. Thompson, 197 F.3d 359 (9th Cir. 1999). 5

TABLE OF AUTHORITIES
(Continued)

STATUTES

28 U.S.C. §2254(d)(1994 ed.) 2, 3, 9

28 U.S.C. §2254(d)(2)(1994 ed.) 3

28 U.S.C. §2254 (d)(2) 3, 5

28 U.S.C. §2254 (d)(3) (1994 ed.) 3

28 U.S.C. §2254 (d)(6)(1994 ed.) 3

28 U.S.C. §2254 (e) 4, 5

28 U.S.C. §2254 (e)(1). 3, 5

MISCELLANEOUS

1 James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure (3d ed. 1998). 5

Larry W. Yackle, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 Pub. Int. L. J. 135, 141 (1996). 6

INTRODUCTION

The Petition for Certiorari in this case raises two important questions. First, whether a state court's findings of fact are entitled to a presumption of correctness in habeas corpus proceedings even though the state court never held an evidentiary hearing under circumstances in which such a hearing was clearly necessary. Second, if such a presumption of correctness applies, whether a habeas petitioner is entitled to present his evidence in federal court to rebut that presumption. Respondent has attempted to avoid these questions by positing that the state courts in this case afforded Petitioner "careful consideration and plenary processing of his claim, including full opportunity for the presentation of the relevant facts." Resp. Br. at 9. This claim does not reflect the ruling of the Seventh Circuit, and is preposterous given the facts of this case.

As Judge Rovner explained in her dissent, the dispute about what Maria Balderrama told the prosecutor is a classic credibility issue. See Pet. App. 13a-15a. To make such an assessment based upon an out-of-court statement by a witness (whether that witness is a prosecutor or anyone else), without ever giving Mendiola the opportunity to present his witnesses or to cross-examine the adverse witness, cannot possibly constitute a reasonable method of determining facts. Yet, this is precisely what happened here. No state court ever heard directly from Mr. Berlin on this issue, whether through his live testimony or affidavit. Rather, the state courts relied on a cursory, unsworn, hearsay statement about what this witness (the prosecutor) had told another prosecutor.

We have no quarrel with the proposition that it is reasonable to decide *some matters* without an evidentiary

hearing. But not *all* matters can be decided in that manner, and the issue involved in this case decidedly could not be adjudicated without hearing from the relevant witnesses. Nonetheless, the Seventh Circuit held that (a) a presumption of correctness applied to the state court's determination of facts; and (b) a petitioner has no right to present his evidence in federal court to rebut that presumption. As we explain in our Petition and below, these two holdings are inconsistent with the holdings of other circuit courts of appeals and are fundamentally misguided.

I. THE SEVENTH CIRCUIT MAJORITY FAILED TO RECOGNIZE THAT STATE COURT DETERMINATIONS OF FACT THAT ARE THE PRODUCT OF INADEQUATE PROCEDURES ARE NOT ENTITLED TO A PRESUMPTION OF CORRECTNESS.

The Seventh Circuit engaged in a two-step analysis in concluding that a federal court should defer to state court findings without inquiring into the adequacy of the procedures leading to such findings. The first step was to focus on this Court's holding in *Sumner v. Mata*, 449 U.S. 539 (1981). In *Sumner*, there was no dispute about the adequacy of the procedures leading to the state appellate court's finding. Indeed, as this Court noted, the defendant in *Sumner* had asked the state appellate court to rule based on the trial record. All that this Court held in *Sumner* was that the word "hearing," as used in the pre-AEDPA version of section 2254(d) (1994 ed.), encompassed an appellate court hearing. The appellate court's findings were, therefore, entitled to a presumption of correctness unless one of the eight factors that rebutted the presumption under the pre-AEDPA statute applied. Significantly, several of these factors focused on the adequacy of the state-court

procedures. For example, the presumption of correctness had no force if "the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing" (28 U.S.C. §2254(d)(2) (1994 ed.)); or "the material facts were not adequately developed at the State court hearing" (28 U.S.C. §2254(d)(3) 1994 ed.)); or "the applicant did not receive a full, fair, and adequate hearing in the State court proceeding" (28 U.S.C, §2254(d)(6) (1994 ed.)).[1]

The Seventh Circuit relied upon *Sumner* for the proposition that appellate court findings are entitled to respect, but the Seventh Circuit declined to apply the next step of the analysis: asking whether the procedures leading to those findings were so plainly inadequate as to render the determination an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254 (d)(2). Nor did the Seventh Circuit recognize that a showing that a state-court decision was the product of inadequate procedures serves to rebut "the presumption of correctness by clear and convincing evidence." 28 U.S.C. §2254(e)(1).

The basis of the Seventh Circuit's refusal to inquire into the adequacy of the state-court procedures was the Seventh Circuit's conclusion that AEDPA had dispensed with any such inquiry. According to the Seventh Circuit, AEDPA

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[1]The decision of the Ninth Circuit in *Vargas v. Lambert*, 159 F.3d 1161 (9th Cir. 1998), recognizes the limited impact of *Sumner*. The court explained that "*Sumner* stands for the * * * narrow proposition that the findings of a state appellate court must be afforded the same presumption of correctness that applies to findings of a state trial court." *Id.* at 1169 n.4. Neither an appellate court nor a trial court is entitled to have its factual findings control when they are not the product of adequate procedures.

> does not require findings to be based on evidentiary hearings. This is a major difference between §2254(e) * * * and its precedessor 28 U.S.C. (1994 ed.) §2254(d). The former statute required deference to "a determination after a hearing on the merits of a factual issue" unless one of eight conditions was satisfied. Section 2254(e), by contrast, omits any mention of a hearing. App. 6a.

Respondent relies heavily on this point in defending the Seventh Circuit's decision. See Resp. Br. at 8, 10, 12, 13-14. This reasoning is at odds, however, with that of several other circuit courts of appeals which have held–after the passage of AEDPA–that state court factfinding is not entitled to any deference in the absence of a "full, fair, and adequate hearing in the state court proceeding on the matter sought to be raised in the habeas petition." *Miller v. Champion*, 161 F.3d 1249, 1254 (10th Cir. 1998) (inner citation omitted). See also *Hughes v. Johnson*, 191 F.3d 607, 630 (5th Cir. 1999) (applying AEDPA and holding that a petitioner is entitled to an evidentiary hearing when "there is a factual dispute, [that,] if resolved in the petitioner's favor, would entitle [him] to relief and the state has not afforded the petitioner a full and fair evidentiary hearing") (inner citation omitted); *Thomas v. Taylor*, 170 F.3d 466 (4th Cir. 1999) (same).

These cases, together with the cases cited in the Petition for Certiorari (at 15-16), exemplify the prevailing view that there is no "major difference" between post-AEDPA and pre-AEDPA law with regard to state court

findings made in the absence of adequate procedures.[2] See 1 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* §20.2c, at 753 (3d ed. 1998) (section 2254(d)(2)'s demand of reasonableness incorporates the full and fair hearing requirement of the pre-AEDPA statute).

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[2]Respondent curiously argues that *Mayes v. Gibson*, 210 F.3d 1284, 1289 (10th Cir. 2000)–one of the cases cited in our Petition–is insignificant because even though this was a case in which AEDPA was being applied, "it is based upon pre-AEDPA law." Resp. Br. at 11-12. That, of course, is our very point. Unlike the Seventh Circuit, the Tenth Circuit, along with several other circuits, has held that AEDPA did not effect a change in this area of habeas jurisprudence. See also *Barnett v. Hargett*, 174 F.3d 1128, 1136 (10th Cir. 1999) (state court hearing was not "full, fair, and adequate" without cross-examination and testing of facts by counsel). Respondent's efforts to distinguish some of the other cases cited in our Petition are equally unavailing. For example, Respondent argues that *Weaver v. Thompson*, 197 F.3d 359 (9th Cir. 1999), focused on whether there had been a "factual determination" in state court. See Resp. Br. at 11. Respondent ignores the fact that the *Weaver* court ruled that there was no "factual determination" meriting deference because the trial judge's factual conclusions in that case "were not subject to any of the usual judicial procedures designed to ensure accuracy." *Weaver*, 197 F.3d at 363. Indeed the court focused explicitly on the fact that the witness in state court–a bailiff–"was not under oath when relaying her account of events to the judge" and was not "questioned by counsel for either side." *Ibid.* Respondent also seeks to distinguish *Morris v. Cain*, 186 F.3d 581 (5th Cir. 1999), by arguing that the court there was applying section 2254(d)(2), as opposed to section 2254(e). Resp. Br. at 11. This claim is flatly wrong. The Court in *Morris* cited both of these provisions, and immediately following its reference to section 2254(e)(1) declared that "[a] full and fair adjudication of a petitioner's claims in state court is a prerequisite for application of AEDPA's review provisions." *Id.* at 584 (inner citation omitted). In any event, part of the Seventh Circuit's error was refusing to apply the terms of both sections 2254(d)(2) and 2254(e)(1), both of which foreclose deference in the absence of fair and adequate state court procedures. See *Torres v. Prunty*, 223 F.3d 1103 (9th Cir. 2000) (once the state procedures are shown to have been inadequate, it follows that they are "unreasonable" as that term is used in section 2254(d)(2), and that the presumption of correctness is rebutted under section 2254(e)(1)). *Torres*, 223 F.3d at 1110 & n.6.

Although Congress revamped the structure of section 2254, and fundamentally changed the law of habeas corpus in some respects, there is absolutely no evidence that Congress intended to have federal courts defer to state court findings that were not the product of fair and adequate procedures. See generally Larry W. Yackle, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 Pub. Int. L. J. 135, 141 (1996).

In an effort to reformulate the nature of the Seventh Circuit's decision, Respondent asserts that the Seventh Circuit, in fact, inquired into the adequacy of the state process in this case and held it to be reasonable. Resp. Br. at 15. There are two problems with this claim. First, it is not true to the Seventh Circuit's opinion. The Seventh Circuit clearly held that because the post-AEDPA statute omits any reference to a "hearing," federal habeas courts are no longer concerned with the nature of the state-court hearing (or whether any such hearing ever took place). Rather, federal courts are only concerned with whether the finding itself has some substantive support in the record. Pet. App. 6a-7a.[3]

The second flaw in Respondent's approach is that the procedures that were used by the Illinois courts in this case cannot possibly stand up to any scrutiny regarding their fairness and adequacy. This latter point is forcefully illustrated by the very cases upon which Respondent has relied to establish the adequacy of the procedures.

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[3]The Seventh Circuit did, of course, look to the evidence in the record that could be said to support the state courts' finding, but it did so in the course of assessing whether there was some substantive support for the finding. It never focused on the procedural fairness of the state court proceedings–the very inquiry it explicitly rejected.

For example, Respondent writes that "[t]he Fifth Circuit has repeatedly held that a paper hearing can be sufficient to afford a petitioner a full and fair hearing on the merits of his issue." Resp. Br. at 9 (citing *Murphy v. Johnson*, 205 F.3d 809, 816 (5th Cir. 2000)). In truth, Fifth Circuit precedent makes clear that the procedures used in this case would never survive that circuit's scrutiny. In *Murphy*, the court held that a "paper hearing" was adequate because defendant was making conclusory allegations without evidentiary support. *Murphy*, 205 F.3d at 817. This is a far cry from what Mendiola was claiming. The sworn affidavit from Maria Balderrama and her court-reported statement constituted her direct eyewitness account of her mid-trial encounter with the prosecutor. The Fifth Circuit treats "paper hearings" as "full and fair" hearing only in "proper circumstances" and requires the federal court to "examine in each case whether a paper hearing is appropriate to the resolution of the factual dispute underlying the petitioner's claim." *Perillo v. Johnson*, 79 F.3d 441, 446 (5th Cir. 1996) (inner citation omitted). Here, the factual dispute was one that clearly required an evidentiary hearing.

In any event, there was no "paper hearing" here. As the Fifth Circuit has explained, "[p]aper hearings are hearings where the state judge did not hear live testimony, but instead relied on affidavits." *Id.* at 446 n.7. Here, by contrast, the state courts never obtained any affidavit, statement or other direct evidence rebutting Balderrama's sworn statements. Moreover, "paper hearings" still afford the defendant the chance to present any and all evidence he wishes, albeit in affidavit form. Here, Mendiola was summarily denied any chance to present his evidence in support of Balderrama's claim because the trial court summarily denied his post-trial motion based on the prosecutor's informal out-of-court representations.

In this case, cross-examination would have provided an opportunity to explore whether Mr. Berlin was actually denying the encounter altogether, or was only denying certain details of it. As it stood, the court was relying on Mr. Rogers' version of what Mr. Berlin had said upon Mr. Berlin's having been confronted with Mr. Roger's best understanding of what Maria Balderrama had alleged.

Respondent also relies upon *United States v. Provost*, 969 F.2d 617, 619 (8th Cir. 1992), for the proposition that assessments of recantations can be decided without evidentiary hearings. Resp. Br. at 9-10. In *Provost*, however, the court held that allegations of prosecutorial misconduct are different than recantations and normally call for evidentiary hearings. *Provost*, 969 F.2d at 620 & n.2 (citing *United States v. MMR Corp.*, 954 F.2d 1040, 1046 (5th Cir. 1992)). Here, Balderrama never recanted. Her post-trial statement described events that took place after her testimony and was fully consistent with the substance of her in-court testimony. See Pet. App. at 20a-21a. Balderrama was prepared to provide direct evidence of prosecutorial misconduct, the very circumstance in which *Provost* held that a hearing is typically required.

In sum, aside from some Seventh Circuit cases that demonstrate the extent to which that circuit is in conflict with other circuits, Respondent has not presented any support for the conclusion that the Illinois courts afforded Mendiola a fair and adequate opportunity to prove his allegation. This Court should grant certiorari to resolve the conflict among the circuits as to whether AEDPA changed the traditional rule that federal courts do not defer to state court factfinding that is the product of unfair and inadequate procedures.

II. THE SEVENTH CIRCUIT IGNORED THE CRITICAL DISTINCTION BETWEEN A DEFENDANT'S ENTITLEMENT TO FEDERAL RELIEF AND HIS ENTITLEMENT TO A FEDERAL EVIDENTIARY HEARING.

Respondent does not deny that the inquiry into a petitioner's entitlement to an evidentiary hearing is different from the question of whether a state court's findings are presumed to be correct. Respondent argues, though, that the inquiries are quite similar and that the Seventh Circuit's holding that the presumption of correctness applies here necessarily carries with it the conclusion that Mendiola was not entitled to a hearing in which he could seek to rebut that presumption. This analysis is akin to a "bait and switch."

When Justice O'Connor wrote that these two questions are "obviously intertwined" (*Keeney v. Tamayo-Reyes*, 504 U.S. 1, 20-21 (1992) (O'Connor, J., dissenting), she was referring to the presumption-of-correctness inquiry contained in the predecessor version of section 2254(d) (1994 ed.). That statute set forth eight situations rebutting the presumption of correctness. Many of these factors focused on the procedural adequacy of the state court proceeding. See *supra* at 2-3. As such, the presumption-of-correctness inquiry mirrored the hearing-related inquiry established in *Townsend v. Sain*, 372 U.S. 293 (1963).

Had the Seventh Circuit recognized, as we argue in Issue I, that the presumption-of-correctness inquiry continues to focus on these same matters, then it would be fair to say that the inquiries remain similar. But the Seventh Circuit did not ask any of these procedural questions with respect to the presumption of correctness. Thus, the hearing-related

inquiry required under *Townsend* is very different from any of the questions that the Seventh Circuit ever addressed.

Respondent agrees that a petitioner is entitled to a federal evidentiary hearing when, *inter alia*, "the factfinding procedure employed by the state court was not adequate to afford a full and fair hearing;" or "the material facts were not adequately developed at the state-court hearing." *Townsend*, 372 U.S. at 313. Obviously, Mendiola had significant evidence he was not allowed to present during the state court proceedings. He should have been allowed to present that evidence in federal court so that he could rebut the presumption of correctness that was being applied.

As we explained in our Petition, the Seventh Circuit's approach creates a Catch-22 whereby a petitioner can never rebut the presumption of correctness by introducing the evidence he has long sought to place before a court. It is perverse for Respondent to counter this claim by pointing to *Torres v. Prunty*, 223 F.3d 1103 (9th Cir. 2000), as an example of how a petitioner can get a federal hearing. The petitioner in *Torres* secured a hearing precisely because the Ninth Circuit asked the questions that the Seventh Circuit refused to ask in this case. See Pet. at 16. The variance between *Torres* and the Seventh Circuit's decision below could hardly be more stark, and strongly supports the granting of certiorari in this case.

CONCLUSION

For the reasons set forth above and in the Petition for Certiorari, Petitioner respectfully requests that the Court grant the relief sought in the Petition for Certiorari.

Respectfully submitted,

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